(9)

AUG 8 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206

In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HILBERT I. TRACHMAN,
Counsel for the Respondent.

HILBERT I. TRACHMAN,
IRVING R. KROSNER,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX

	PAGE
Statement	1
Summary of Respondent's Points	2
The Proceedings and Evidence in the Courts Below.	3
A. The Proceedings	3
B. The Evidence	7
POINT I—The decision of the Second Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter	13
POINT II—The decision of the Second Circuit Court of Appeals is not in conflict with applicable decisions of this court	14
POINT III—In any event, irrespective of the "colorability" of petitioner's claim, the Bankruptcy Court had summary jurisdiction	17
POINT IV—There is no important question of Federal Law involved which has not been heretofore settled by this Court	19
POINT V—The controversy between the parties has become moot	19
Conclusion	22

TABLE OF CASES CITED:

American Book Co. v. *Kansas*, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 613 21

Babbitt v. *Dutcher*, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402 17

Benedict v. *Ratner*, 268 U. S. 353, 45 S. Ct. 566....18, 19

Blum, In re, 202 Fed. 883 (C. C. A. 7th Cir. 1913).... 2n

Borok, In re, 50 Fed. (2d) 75 18

Buck's Stove, etc. Co. v. *American Federation of Labor*, 219 U. S. 581, 31 S. Ct. 492, 55 L. Ed. 345.. 21

Chandler v. *Wise*, 307 U. S. 474, 59 S. Ct. 992, 83 L. Ed. 1407 20

Cooney v. *Collins*, 176 Fed. 189 (C. C. A. 9th Cir. 1910) 2n

Dakota County v. *Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981 21

Elwell v. *Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998 21

Farrow, In re, 13 Fed. (2d) 261 (D. C. D. Mass. 1926) 2n

Goldstein, In re, 216 Fed. 887 (C. C. A. 7th Cir. 1914) 2n

Green, In re, 207 Fed. 693 (D. C. E. D. Pa. 1913).... 2n

Gulf, etc. R. Co. v. *Dennis*, 224 U. S. 503, 32 S. Ct. 542, 56 L. Ed. 860 20

Harrison v. *Chamberlin*, May 3, 1936, 271 U. S. 191, 46 S. Ct. Reporter 467.....2, 2n, 3, 13, 14, 15, 16

Jones v. *Montague*, 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913 20

Langnes v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520 19

Lewis Pub. Co. v. *Wyman*, 228 U. S. 610, 33 S. Ct. 599, 57 L. Ed. 989 20

PAGE

Lissak, In re, 110 Fed. (2d) 370 18

Little v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 Ed. 1016 ..... 20, 21

Mammoth Oil Co. et al. v. *U. S.*, 275 U. S. 13, 48 S. Ct. 1 ..... 9n

May v. *Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870 17

Meiselman, In re, 105 Fed. (2d) 995 16

Midtown Contracting Co., In re (1917), 243 Fed. 56.. 13n

Mills v. *Green*, 159 U. S. 659, 16 S. Ct. 132, 40 L. Ed. 293 20

Mueller v. *Nugent*, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405 17

Page v. *Edmunds*, 187 U. S. 596, 23 S. Ct. 200, 47 L. Ed. 318 17

Paramount Fireproof Door Co., Inc., In re (1930), 43 Fed. (2d) 558..... 13n

Ryerson v. *U. S.*, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 19

Scheinbaum, In re (1901), 107 Fed. 247..... 13n

Schwartz v. *Horowitz*, 131 Fed. (2d) 506 18

Security Mut. L. Ins. Co. v. *Prewitt*, 200 U. S. 446, 26 S. Ct. 314, 50 L. Ed. 545 20

Seldon v. *Montague*, 194 U. S. 153, 24 S. Ct. 613, 48 L. Ed. 915 20

Singer Mfg. Co. v. *Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906.....20, 21

Story Parchment Co. v. *Paterson Parchment Paper Co. et al.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544 19

Tarbox, In re, 185 Fed. 985 (D. C. D. Mass. 1910)... 2n

Taubel, Scott, Kitzmiller Co. v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770 17

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, 60 S. Ct. 628 17

PAGE

United States v. *Alaska S. S. Co.*, 253 U. S. 113, 40 S. Ct. 448, 64 L. Ed. 808 20
U. S. ex rel. Bilokumsky v. *Tod*, 263 U. S. 149, 44 S. Ct. 54 ..... 9n
U. S. v. *Evans*, 213 U. S. 297, 29 S. Ct. 507, 53 L. Ed. 803 20

Weston, In re, 68 Fed. (2d) 913 18
White, In re (1928), 25 Fed. (2d) 341 ..... 2n
Wingert v. *Hagerstown First Nat. Bank*, 223 U. S. 670, 32 S. Ct. 391, 56 L. Ed. 605 20
Worrall, In re, 79 Fed. (2d) 88 18

Yorkville Coal Co., In re (1914), 211 Fed. 619 ..... 13n

OTHER AUTHORITY CITED:

Bankruptcy Act:
Section 70(a), subdivision 5 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner Florence Hills Rogers, wife of the bankrupt, petitions for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Second Circuit, of March 29, 1944, and reported in 141 Fed. (2d) 374 (R. 630, 637-648).

The order of the Referee in Bankruptcy (R. 174-175), affirmed by the District Court (R. 174) and the Circuit Court of Appeals (R. 213-216) adjudicated: that a policy of life insurance number 4076077 (hereinafter referred

to for convenience as "#077"), issued by the Equitable Life Assurance Society of the United States (hereinafter referred to as the "Insurance Company") upon the life of the bankrupt, passed pursuant to Section 70 (a), subdivision 5 of the Bankruptcy Act, to the Trustee in Bankruptcy; that the Trustee was entitled to the cash surrender value as of the date of bankruptcy $9,270.70; gave the bankrupt an opportunity to pay the cash value and then carry said policy free from the claims of creditors; and upon his failure to pay the cash value directed that the policy be turned over to the Trustee and that the bankrupt execute such papers as might be required by the Insurance Company to effectuate the payment of the said cash value to the Trustee (R. 157-160).

Summary of Respondent's Points.

I. The decision of the Second Circuit Court of Appeals in this case is not in conflict with "the decision of another Circuit Court of Appeals on the same matter".

All decisions in other circuits relied upon by the petitioner as creating the alleged conflict were superseded by this court's decision in *Harrison* v. *Chamberlin*, May 3, 1936, 271 U. S. 191, 46 S. Ct. Reporter 467.[1]

II. The decision of the Second Circuit Court of Appeals is not "in conflict with applicable decisions of this Court".

The petitioner's claim was "colorable" in full con-

---

[1] The said cases cited by the petitioner on the question of a conflict are *In re Blum*, 202 Fed. 883 (C. C. A. 7th Cir. *1913*), *Cooney* v. *Collins*, 176 Fed. 189 (C. C. A. 9th Cir. *1910*), *In re Goldstein*, 216 Fed. 887 (C. C. A. 7th Cir. *1914*), *In re Green*, 207 Fed. 693 (D. C. E. D. Pa. *1913*), *In re Tarbox*, 185 Fed. 985 (D. C. D. Mass. *1910*). *In re Farrow*, 13 Fed. (2d) 261 (D. C. D. Mass. 1926) was decided two days after this court's decision in *Harrison* v. *Chamberlin*, *supra*, and the District Judge who wrote that opinion took another view after the *Harrison* v. *Chamberlin* decision. *In re White* (1928), 25 Fed. (2d) 341.

formity with this Court's decision in *Harrison* v. *Chamberlin, supra.*

III. In any event, irrespective of the "colorability" of petitioner's claim, the Bankruptcy Court had summary jurisdiction.

IV. There is no important question of Federal law involved which has not been heretofore settled by this court.

V. The controversy between the parties has become moot.

The bankrupt, in proceedings instituted by him subsequent to the entry of the turn-over order, acknowledged his ownership of policy #077; the policy was surrendered by the Bankrupt to the Trustee, and the cash value directed to be paid to the Trustee was paid to him.

The Proceedings and Evidence in the Courts Below.

We are obliged to set forth in some detail the proceedings in the courts below in order that this court may have before it the necessary facts upon which we base our Point IV, that the controversy between the parties has become moot.

It also becomes necessary to give a review of the evidence, more extensive than usual, because the petitioner has seen fit to select only certain portions of the evidence and has colored her interpretation of this evidence to suit her purpose.

A. The Proceedings.

Alfred M. Rogers, the husband of the petitioner, filed a voluntary petition in bankruptcy on November 17, 1939 and was immediately adjudicated a bankrupt. He sched-

uled liabilities of $154,947.39 and no assets of any value, except wearing apparel of $150, for which he claimed an exemption. He neither scheduled nor claimed any exemption for any insurance policy (Tr. Ex. 14, R. 137, 186).

The investigation conducted by the Trustee in Bankruptcy disclosed, that in an attempt to make himself judgment proof, the bankrupt, without consideration, transferred to his wife and two children assets of the face value of over two million dollars, exclusive of policy #077 (R. 187). After the said policy was unearthed by the Trustee, he instituted turn-over proceedings, upon due notice, to reach the cash value of the said policy #077 as of the date of bankruptcy (R. 2-5).

The answers filed by the bankrupt and the petitioner (R. 6-7, 8-10) were in substance: that the bankrupt had assigned the policy to his wife about two years before the petition in bankruptcy was filed; that the petitioner was an adverse claimant and objected to the summary jurisdiction of the Bankruptcy Court. It later developed that the claimed assignment was an oral one.

The order to show cause was returnable on September 10, 1941, the issues were tried and proof was taken on three dates: October 21, 1941 (R. 12-47); October 29, 1941 (R. 48-83); and January 7, 1942 (R. 122). At no time did the petitioner request an opportunity to submit any additional evidence or even suggest to the Court that she had other evidence to submit.[2] Indeed, the petitioner's counsel at the conclusion of the hearings stated (R. 116):

"Mr. Chapin: The respondent rests its case."

The Referee filed his decision granting the Trustee's petition on February 25, 1942 (R. 151 *et seq.*) and an

[2] Petitioner's implication (p. 16 of her brief) that a summary proceeding did not afford her an opportunity to marshal all her witnesses and her evidence is belied by the fact that almost a month elapsed between the return date of the notice and the first hearing date, and more than two months had elapsed thereafter before the hearings were completed.

order thereon was entered on March 2, 1942 (R. 157 *et seq.*).

Petitions to the District Court to review the Referee's said order were filed by the bankrupt and his wife (R. 160-164) and were heard on March 25, 1942 (R. 165, fol. 195; R. 189, fol. 566). On the same day there was also heard by the same District Judge, the Trustee's motion to punish the bankrupt and his wife for contempt of court for failing to comply with the Referee's said order of March 2, 1942.

The District Judge was requested by counsel for the bankrupt to hold in abeyance his decisions on these motions until there had been decided another motion which would be heard that very day by the Referee, which had been made by the bankrupt to amend his schedules so as to include said policy #077 as his own asset and to have it declared exempt (R. 177-182).

By his motion papers the bankrupt first sought to amend his schedule by listing his policy as an asset, with the statement that it had been assigned to his wife. On the argument of the motion, however, the bankrupt changed his position and asked leave to schedule the policy *as his own asset* (R. 182, fol. 576; R. 195, fol. 583; R. 198, fol. 594). The Bankrupt therefore acknowledged ownership, dominion and control of said policy #077, and the claim of an alleged oral assignment to his wife was thereby abandoned.

The motion to amend the schedules was denied by the Referee (R. 192-193) and affirmed on review by another District Judge (Decision, R. 197-202; 51 Fed. Supp. 930). No appeal was taken from that decision.

Thereafter the District Court affirmed the Referee's turn-over order of March 2, 1942 (R. 171, 173) and an order thereon was entered on June 17, 1942 (R. 174-175). That District Court Judge, aware of the bankrupt's acknowledgment of complete ownership of policy #077, apparently deemed it unnecessary to continue the controversy with the petitioner. Though the Trustee sought

to have both the bankrupt and his wife punished for contempt for failing to comply with the Referee's turn-over order, only the bankrupt was punished for contempt (R. 204, 208, fol. 623). The petitioner was therefore under no compulsion to comply with the turn-over order.

On July 2, 1942 the petitioner filed her notice of appeal from the District Court's order of June 17, 1942, which affirmed the Referee's turn-over order of March 2, 1942 (R. 176). The bankrupt did not appeal.

Thereafter the petitioner applied to a third District Judge for an order staying the Trustee from enforcing against the bankrupt the contempt order of June 18th, 1942 (R. 614). The petitioner was the sole movant, the bankrupt was not a party to the motion. This motion was denied on July 29th, 1942 (R. 205-206). Neither the petitioner nor the bankrupt sought any further stays of the contempt order, nor was any appeal taken from the order denying the stay.

On the contrary, the bankrupt proceeded to comply with the turn-over order. The petitioner's version of that compliance was: that she had turned over the said policy #077 to her attorneys, authorized them to deliver it to the bankrupt's attorney, and in turn authorized the bankrupt's attorney to deliver the policy to the Trustee's attorney (R. 209, fol. 627; R. 210, fol. 628).

The Trustee maintained his position, however, that the policy had been continuously in the control and possession of the bankrupt and in fact was surrendered by the bankrupt (R. 210).

On August 25th, 1942 the bankrupt's attorney delivered the policy to the Trustee's attorney and simultaneously therewith delivered a written authorization signed and acknowledged by the bankrupt which directed the Insurance Company to accept surrender of the said Policy #077, to pay the Trustee $9,270 out of its cash value, and to pay the cash value which accrued after bankruptcy *to the bankrupt* (R. 208, fol. 624; R. 209, fol. 625).

The payment was duly made by the Insurance Company to the Trustee in accordance with the said authorization.

B. The Evidence.

Through an attorney and an assistant register of the Insurance Company, the following facts were established and were never contradicted:

On May 2, 1926 the Insurance Company issued to the bankrupt as the insured its policy #077 in the principal sum of $25,000. His wife, Florence Hills Rogers, the petitioner, was designated as the beneficiary, the bankrupt reserving, however, the right to revoke this designation (Tr. Ex. 1, Policy of Insurance, R. 122).

At the time of the filing of the petition in bankruptcy, and at the time of the turn-over hearing, there were: no outstanding loans upon the said policy (R. 17); the policy had a cash value of $9,270.70 (R. 54); there was not on file with the Insurance Company any written assignment of the policy, nor had the Insurance Company received any oral notification of any alleged assignment (R. 17-18); the policy specifically provided that no assignment of the policy would be binding upon the Insurance Company unless in writing and filed with the Insurance Company at its home office (R. 122); the bankrupt as the insured could exercise all rights of ownership conferred by the policy (R. 66).

The petitioner's claim of ownership of the policy was predicated entirely upon an alleged conversation which she testified took place between herself and her husband in 1937, no one else being present. Her husband was never called as a witness. The petitioner's testimony with reference to the alleged oral assignment consisted solely of a one-sentence version, as follows (R. 100):

> "Q. What was that conversation? A. That he couldn't continue the premium on it and that he

would give it to me, if in any way I could with my policy which I had, if I could adjust it so as I could carry it."

This was completely nullified by the petitioner's admissions on cross examination. After reading to the petitioner portions of her 21 (a) examination, the Trustee obtained the following admission from her (R. 111):

"Q. You could not testify under what circumstances you obtained that policy; is that correct? A. No, *I did not know why I received this policy.* You mean this policy, Mr. Krosner?

Q. I am referring to policy #077, Trustee's Exhibit 1—in your right hand. A. Yes." (Italics ours.)

With reference to the petitioner's alleged possession of the policy from 1937 up to the date of the turn-over proceeding, the petitioner likewise admitted, when confronted with her 21 (a) examination of August 1941 (R. 108), that she could not explain her lack of knowledge in August 1941 of the circumstances under which she had obtained possession of the policy (R. 109).

After considerable sparring with the Trustee's attorney, she finally testified that it was only that very day in the courtroom (January 7, 1942) that she had ascertained from an examination of a "letter" that the policy had been delivered to her in April 1937 (R. 109).

The petitioner claimed that after the alleged oral assignment, the policy was kept in a safe deposit vault at the New Rochelle Trust Company (R. 98). When she was asked by her own counsel if her husband was "co-owner" or "co-lessee" of the said vault, she testified that she did not know (R. 99). Thereafter, she finally admitted that her husband also had access to that box (R. 105).

A representative of the New Rochelle Trust Company testified that the safe deposit vault was jointly in the name of Mr. and Mrs. Rogers (R. 121, 140). When the

bankrupt's name was eliminated from joint access to the box could not be ascertained.

In view of the fact that the bankrupt was the only person, other than the petitioner, who was in a position to testify about the alleged oral assignment and the alleged possession of the policy by the petitioner, the courts below properly considered the failure to call him as a witness as having direct bearing on the "color" of the petitioner's claim.[3]

Concededly the bankrupt was at his own home and was available as a witness (R. 107). The only explanation tendered for the bankrupt's non-appearance was a claim that: "My husband is not able to tell the truth because he does not understand, he cannot remember, he cannot remember even twenty-four hours or an hour or two, his mental condition is such (R. 115-116). This claim was completely unsupported by medical testimony or any competent proof, notwithstanding the fact that the bankrupt had been examined prior thereto on a 21 (a) examination.

In an effort to bolster her alleged claim of the oral assignment of the policy, the petitioner introduced evidence purely circumstantial. This evidence, however, far from tending to establish an oral assignment, further indicated that her claim was fictitious and a mere pretense.

A loan was repaid on policy #077 to the Insurance Company with funds representing the proceeds of another policy of life insurance in the same company, #4076076

---

[3] In *U. S. ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153, 154, 44 S. Ct. 54, 56, this Court said:

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. (Citing cases.)"

See also:

> *Mammoth Oil Co. et al.* v. *U. S.*, 275 U. S. 13, 52, 53, 48 S. Ct. 1, 10, and cases therein cited.

(hereinafter referred to as #076). However, the proceeds of policy #076 were not the petitioner's funds.

Policy #076 was originally issued to Francis Rogers & Sons, Inc. on the life of the bankrupt (R. 110, 111). By resolution of that corporation, this policy was to have been assigned to the bankrupt (R. 138), but was thereafter assigned to Mrs. Rogers (R. 139). The assignment was then recorded with the Insurance Company. However, the premiums on policy #076 had been paid out of the joint account of Mr. and Mrs. Rogers in the New Rochelle Trust Company (R. 54-56, Trustee's Exhibits 16 and 17, transcript of the joint bank account, R. 138, 210). The total of the premiums so paid between May 2, 1928, and June 2, 1936, on policy #076 was $19,883.

Parenthetically, it might be noted that the joint bank account was maintained for a period of ten years, during which time deposits totaling $382,191.92 were made, or an average deposit of $38,000 a year (Tr. Exs. 16 and 17 not printed R. 207). This is hardly a bank account of a housewife.

In paying off the loan on policy #077, the petitioner was not using her own funds, but her husband's.

The petitioner also introduced in evidence four checks signed by her totaling $4,469.75 for premium payments on policy #077. Two were for annual premiums prior to bankruptcy and two for premiums which became due thereafter (R. 147). These checks were drawn on the former joint bank account. However, petitioner's own Exhibit 3 (R. 142), established that when policy #076 was surrendered, part of the cash value so obtained was applied in payment of the loan due on policy #077 and the check for the balance, $7,103.87, was deposited in May 1937 in the New Rochelle bank account (R. 144-145, Tr. Exs. 16 and 17; R. 138, 210).

Therefore, when Mrs. Rogers was issuing checks on that bank account for payment of premiums on policy #077, she was also using funds that had been derived

from her husband's property and was not using her own funds.

Another bit of circumstantial evidence introduced by the petitioner were two forms usually enclosed in premium notices, which permit the insured to designate whether the annual dividends are to be applied towards premium payments. Mrs. Rogers signed her name on two such forms relating to policy #077 (R. 149, 150). The Insurance Company representative admitted that they had received similar requests in former years signed, in one instance, by Alfred M. Rogers, Jr., as Treasurer, and in another by Francis Rogers & Sons, Inc., both of whom admittedly never had any interest in policy #077 (R. 65, 66; Tr. Exs. 12 and 13, R. 135, 136).

The same witness explained that the company was "not so particular" when the dividend is being applied to the premium payment (R. 65). He then went on to testify that the Bankrupt, at all times, except for an intervening period when the policy had been assigned by the bankrupt in writing to the Irving Trust Company, as security for a loan to him, was the owner of the policy and was entitled to exercise all rights conferred under the policy (R. 15, 64, 65, 66).

The course of conduct admittedly pursued by the petitioner subsequent to the date of the alleged oral assignment also stamped her claim as "unsubstantial and obviously insufficient".

She testified that, after the alleged conversations with her husband, an appointment was made with the Insurance Company, which she and her husband kept, at which time arrangements were made to pay off the loan on policy #077. Although she was repeatedly asked to state the details of the conversation had with the Insurance Company's representative at this appointment, her testimony was to the effect that neither she nor her husband had in any manner made mention of the claimed assignment (R. 113).

According to her own story, when she went to the Insurance Company, she took with her policy #076 to cash surrender it, in order to obtain the funds to pay off the loan on policy #077. When policy #076 had been assigned to her, it was by a written assignment which had been filed with the same Insurance Company. Her failure to obtain a similar written assignment of policy #077 at a time when she was at the Insurance Company office, with her husband present, where the forms for assignment were readily obtainable, which could have immediately been signed by her husband and filed with the Insurance Company, further stamped her claim as a mere pretense.

The record also shows that the petitioner had another opportunity to place herself on record with the Insurance Company concerning the alleged assignment of the policy to her, when in April, 1938, a year later, she wrote a letter requesting the insurance company to send the 1938 premium notice to a new address (R. 149). The Insurance Company declined her request unless the bankrupt "personally filled out the enclosed form" and returned it "with his signature thereon" (Petitioner's Exhibit 10 A, R. 148). Thus, when the Insurance Company put her on notice that she had no interest in the policy, even to the extent of directing a change of address for one premium notice, Mrs. Rogers admittedly did nothing.

No explanation was offered by her for her failure to obtain and file with the Insurance Company a written notice of assignment, in the four years that elapsed between the date of the alleged assignment and the institution of the turnover proceedings.

POINT I.

The decision of the Second Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

The petitioner seeks certiorari on the ground that the decision in the instant case created an alleged conflict with decisions rendered in other Circuits. There is no basis for this claim. The decisions of other Circuits which are cited on the question of "conflict" were all decided prior to May 3, 1926, at which time this Court decided *Harrison* v. *Chamberlin* (*supra*), 271 U. S. 191, 46 S. Ct. 467 (see comment this brief, *supra*, page 2).

The prior decisions of the Second Circuit Court of Appeals which petitioner claims established the former rule in the Second Circuit from which it allegedly departed in the present case were also decided before *Harrison* v. *Chamberlin* (*supra*).[4]

In *Harrison* v. *Chamberlin*, *supra*, the Court specifically sought to put at rest any conflicts that existed in the several Circuits, for it said at page 194 of 271 U. S.:

> "Without entering upon a discussion of various cases in the Circuit Court of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, * * *."

---

[4] *In re Midtown Contracting Co.* (1917), 243 Fed. 56; *In re Yorkville Coal Co.* (1914), 211 Fed. 619.

In re Paramount Fireproof Door Co., Inc. (1930), 43 Fed. (2d) 558, and *In re Scheinbaum* (1901), 107 Fed. 247, were not decisions by the Second Circuit Court of Appeals, but by District Courts in that Circuit.

POINT II.

The decision of the Second Circuit Court of Appeals is not in conflict with applicable decisions of this court.

The decision in the instant case is in conformity with the rules which were laid down by this court. *Harrison* v. *Chamberlin, supra.* The Rules were stated as follows (page 193 of 271 U. S.):

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit. (Citing cases.) However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding. (Citing cases.)
>
> "* * * It is clear, however, that an actual claim may be adverse and substantial even though in fact 'fraudulent and voidable.' *Mueller* v. *Nugent, supra,* 15 (22 S. Ct. 269); *Johnston* v. *Spencer,* 195 F. 215, 220, 115 C. C. A. 167; *Board of Education* v. *Leary, supra,* 525 (149 C. C. A. 573). And, on the other hand, a claim is merely colorable if 'on its face made in bad faith and without any legal justification.' *May* v. *Henderson, supra,* 109 (45 S. Ct. 456).
>
> "* * * we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,' *Board of Education* v. *Leary, supra,* 527 (149 C. C. A. 573), in matters either of fact or law; and is not to be held merely colorable unless the

> preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense. Compare *Binderup* v. *Pathe Exchange*, 44 S. Ct. 96, 263 U. S. 291, 295, 68 L. Ed. 308; and *Moore* v. *New York Cotton Exchange* (No. 200), 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, decided April 12, 1926."

It is quite plain from a consideration of the evidence before the courts below and the several opinions of the three courts, that the claim of the petitioner of an alleged oral assignment was precisely within the category of being "unsubstantial and obviously insufficient" in fact, "as to be plainly without color of merit and a mere pretense."

The petitioner concedes that the Bankruptcy Court was not ousted of jurisdiction merely because she labelled her claim as "adverse" and that the Bankruptcy Court had the power to inquire whether that claim was "real and substantial or merely colorable."

The petitioner, however, urges that when the Court concluded that the petitioner's claim was colorable, it necessarily weighed the evidence offered by the petitioner against the evidence offered by the Trustee. That argument is based upon a tortured interpretation of the evidence which was adduced before the Referee.

The Referee was not required to weigh any conflicting evidence. We have heretofore pointed out in the review of the evidence, and as found by the three courts below, the very words out of the mouth of the petitioner, as well as the uncontradicted evidence in the Record, all clearly established that her claim was totally without color of merit and a mere pretense.

The opinion of the Circuit Court clearly does not speak of any weighing of evidence by the Referee, nor does it directly or by implication approve of any procedure which is in conflict with *Harrison* v. *Chamberlin*, *supra*. The petitioner seeks to read those implications into the

Circuit Court's opinion for the sole purpose of having this Court review the fact-findings of the lower courts. Certiorari is not available for that purpose.

Only one of the cases cited by the petitioner, *In re Meiselman*, 105 Fed. (2d) 995, 997, is a decision rendered by the Circuit Court for the Second Circuit subsequent to this Court's decision in *Harrison* v. *Chamberlin*, *supra*. The petitioner asserts that *In re Meiselman* enunciates a principle of law in conflict with the decisions of this Court. An examination of that part of the decision applicable herein, clearly indicates that Judge Clark was following the principles laid down by this Court.

> "It is now settled that if there is a real and substantial controversy of law or fact as to property held adversely to a bankrupt—'a contested matter of right, involving some fair doubt and reasonable room for controversy'—the bankruptcy court is 'without jurisdiction' to adjudicate the matter, but the trustee must have resort to a plenary suit. *Harrison* v. *Chamberlin*, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897, quoting *Board of Education* v. *Leary*, 8 Cir., 236 F. 521, 525; *In re Quan Weing et al.*, 2 Cir., 104 F. 2d 112. But the mere assertion of an adverse claim is not enough, and the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. Id.; *May* v. *Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. Hence we must decide whether this case furnishes such reasonable doubt as to make the referee's order, affirmed by the District Court, unjustified. We do not interpret these decisions as requiring the holding that there is reasonable doubt from the claimant's own testimony alone, when it is disbelieved by the referee, or from his claims of law, when not supported by the precedents. A claimant cannot avoid a summary order by the very audacity of his claims of either fact or law. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest and a due con-

sideration of existing law. As soon, however, as a substantial claim is disclosed, the rule is mandatory that the court of bankruptcy cannot proceed further."

POINT III.

In any event, irrespective of the "colorability" of petitioner's claim, the Bankruptcy Court had summary jurisdiction.

It is fundamental that if the Bankruptcy Court has possession, either actual or constructive, of the *res* involved in a turn-over proceeding, it has summary jurisdiction of an adverse claimant for the purpose of determining on the merits any controversy relating to the *res*.

Where a bankrupt has retained dominion and control over the *res*, the Bankruptcy Court has summary jurisdiction.

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481, 60 S. Ct. 628;
Taubel, Scott, Kitzmiller Co. v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770;
Mueller v. *Nugent*, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405;
Babbitt v. *Dutcher*, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402;
May v. *Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870;
Page v. *Edmunds*, 187 U. S. 596, 23 S. Ct. 200, 47 L. Ed. 318.

The undisputed facts in the instant case are: that at the time of the filing of the petition in bankruptcy and continuously thereafter, the Bankrupt had retained all rights under the policy of insurance; no assignment was filed with the Insurance Company nor was it notified of any assignment; and the Bankrupt was the only one

who was in a position to exercise all rights of ownership conferred by the terms of the policy. The evidence also established the bankrupt's possession of the insurance contract. Dominion and control of the policy and its benefits were therefore in the bankrupt.

A policy of insurance is nothing more than a chose in action. Dominion and control is retained by the bankrupt where the alleged assignee has failed to perfect his alleged title by notification to the third party. This has been repeatedly held in the Second Circuit.

In re Lissak, 110 Fed. (2d) 370;
In re Borok, 50 Fed. (2d) 75;
In re Worrall, 79 Fed. (2d) 88;
Schwartz v. *Horowitz*, 131 Fed. (2d) 506;
In re Weston, 68 Fed. (2d) 913.

The aforesaid principle has its roots in *Benedict* v. *Ratner*, 268 U. S. 353, 45 S. Ct. 566. It was there stated (p. 361 of 268 U. S.):

> "But it would seem clear that whether the collateral consist of chattels or of accounts, reservation of dominion inconsistent with the effective disposition of title must render the transaction void."

Further, at page 363, the Court said:

> "But it is not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. *It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title*, and creation of a lien." (Italics ours.)

Further, at page 364, the Court said:

> "This dominion is the differentiating and deciding element."

While in the *Ratner* case this Court was concerned with the assignment of accounts receivable, the principles are just as applicable to the assignment of any other chose in action such as an insurance policy.

Hence in the instant the Bankruptcy Court in any event had summary jurisdiction.

POINT IV.

There is no important question of Federal Law involved which has not been heretofore settled by this Court.

The discussions under Points II and III of this brief and the many cases decided by this Court cited thereunder, are respectfully referred to this Court in support of this point.

POINT V.

The controversy between the parties has become moot.

This question was presented by us to the Second Circuit of Appeals but was not mentioned in its *per curiam* decision. We present it to this court on the authority of

Langnes v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520;

Story Parchment Co. v. *Paterson Parchment Paper Co. et als.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544;

Ryerson v. *U. S.*, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917.

When during the pendency of an action or an appeal a case becomes moot so that there is no longer any case

or controversy pending, the Court loses jurisdiction and the appeal will be dismissed.

United States v. *Alaska S. S. Co.*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808;
Lewis Pub. Co. v. *Wyman*, 228 U. S. 610, 33 S. Ct. 599, 57 L. Ed. 989;
Gulf, etc. R. Co. v. *Dennis*, 224 U. S. 503, 32 S. Ct. 542, 56 L. Ed. 860;
Wingert v. *Hagerstown First Nat. Bank*, 223 U. S. 670, 32 S. Ct. 391, 56 L. Ed. 605;
U. S. v. *Evans*, 213 U. S. 297, 29 S. Ct. 507, 53 L. Ed. 803;
Security Mut. L. Ins. Co. v. *Prewitt*, 200 U. S. 446, 26 S. Ct. 314, 50 L. Ed. 545;
Seldon v. *Montague*, 194 U. S. 153, 24 S. Ct. 613, 48 L. Ed. 915;
Jones v. *Montague*, 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913.

This principle applies, even if the intervening circumstances are not in the control of the appellant, but certainly applies where the appellant has control of the circumstances, as in the instant case.

Mills v. *Green*, 159 U. S. 659, 16 S. Ct. 132, 40 L. Ed. 293;
Chandler v. *Wise*, 307 U. S. 474, 477, 478, 59 S. Ct. 992, 83 L. Ed. 1407;
Lewis Pub. Co. v. *Wyman*, 228 U. S. 610, 33 S. Ct. 599, 57 L. Ed. 989;
Singer Mfg. Co. v. *Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906;
Little v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016.

Where pending an appeal, the appellant obeys the command of the decree appealed from, the appeals have been

dismissed; viz: where taxes, the collection of which was sought to be enjoined, were paid; or where the case is settled or compromised or the judgment or decree voluntarily paid or satisfied.

Singer Mfg. Co. v. *Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906;
Little v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016;
Buck's Stove, etc. Co. v. *American Federation of Labor*, 219 U. S. 581, 31 S. Ct. 492, 55 L. Ed. 345;
Dakota County v. *Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981;
Elwell v. *Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998;
American Book Co. v. *Kansas*, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 613.

In the instant case the controversy has been terminated. The order of the Referee directing the delivery of the policy to the Trustee has been fully satisfied and complied with.

According to her own version of what occurred, the petitioner surrendered the policy to her husband with the full knowledge that it would be delivered to the Trustee to be cash surendered to the Insurance Company (R. 208, 209-210). She thus participated in the satisfaction of the order appealed from. She did this notwithstanding the fact that she was under no legal compulsion to surrender the policy (if indeed she had it in her possession), because the motion to punish for contempt for noncompliance with the turn-over order was limited to the bankrupt only (R. 208). Indeed, the petitioner recognized this limitation in the contempt order when she made a motion to stay its execution. This motion was brought not on her behalf but solely on behalf of the bankrupt (R. 205).

Therefore, there is no longer any controversy pending and it is unnecessary for this Court to decide a moot question.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

HILBERT I. TRACHMAN,
Counsel for the Respondent.

HILBERT I. TRACHMAN,
IRVING R. KROSNER,
Of Counsel.